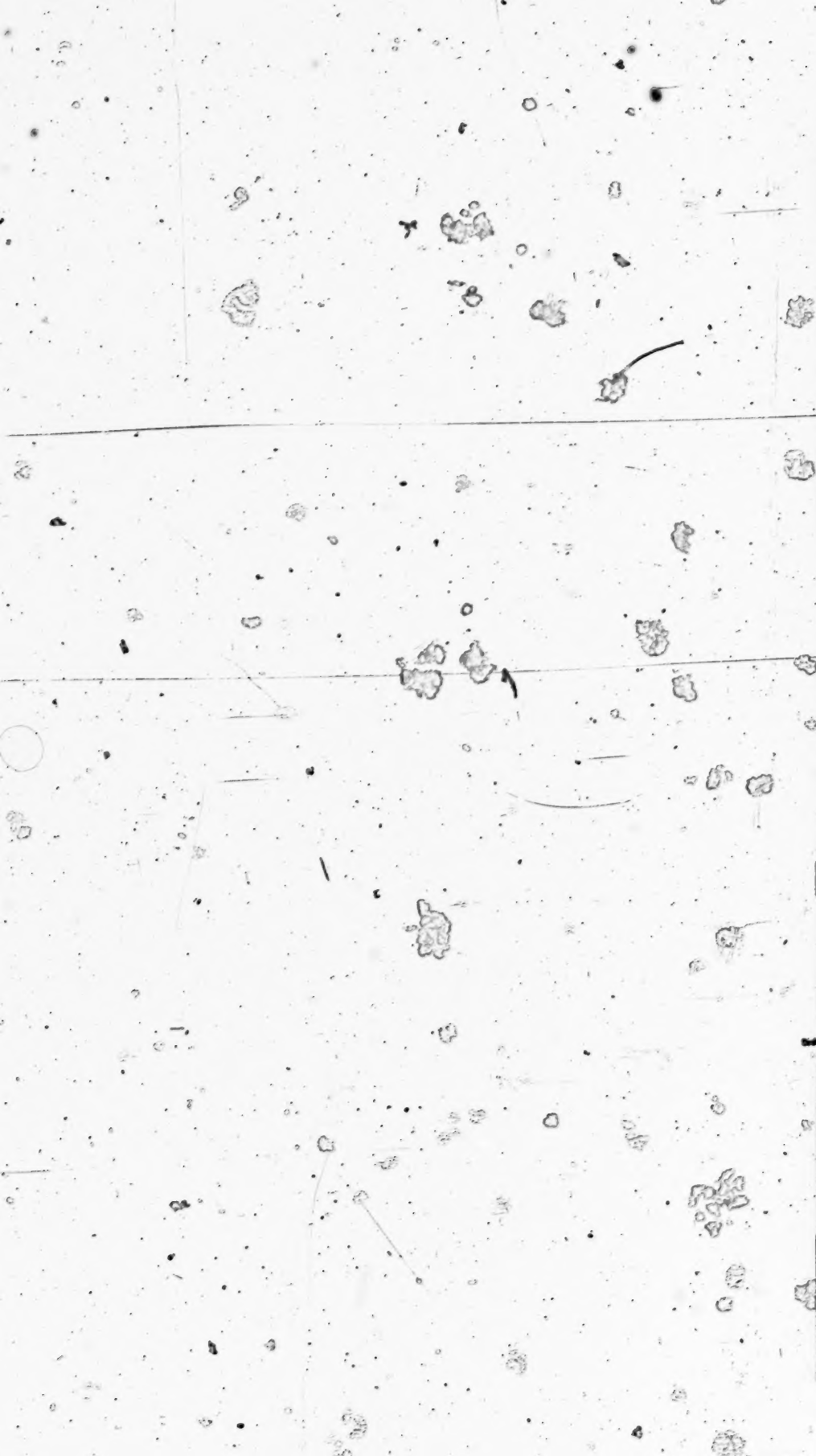

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No. 570

In the Supreme Court of the United States

OCTOBER TERM, 1939

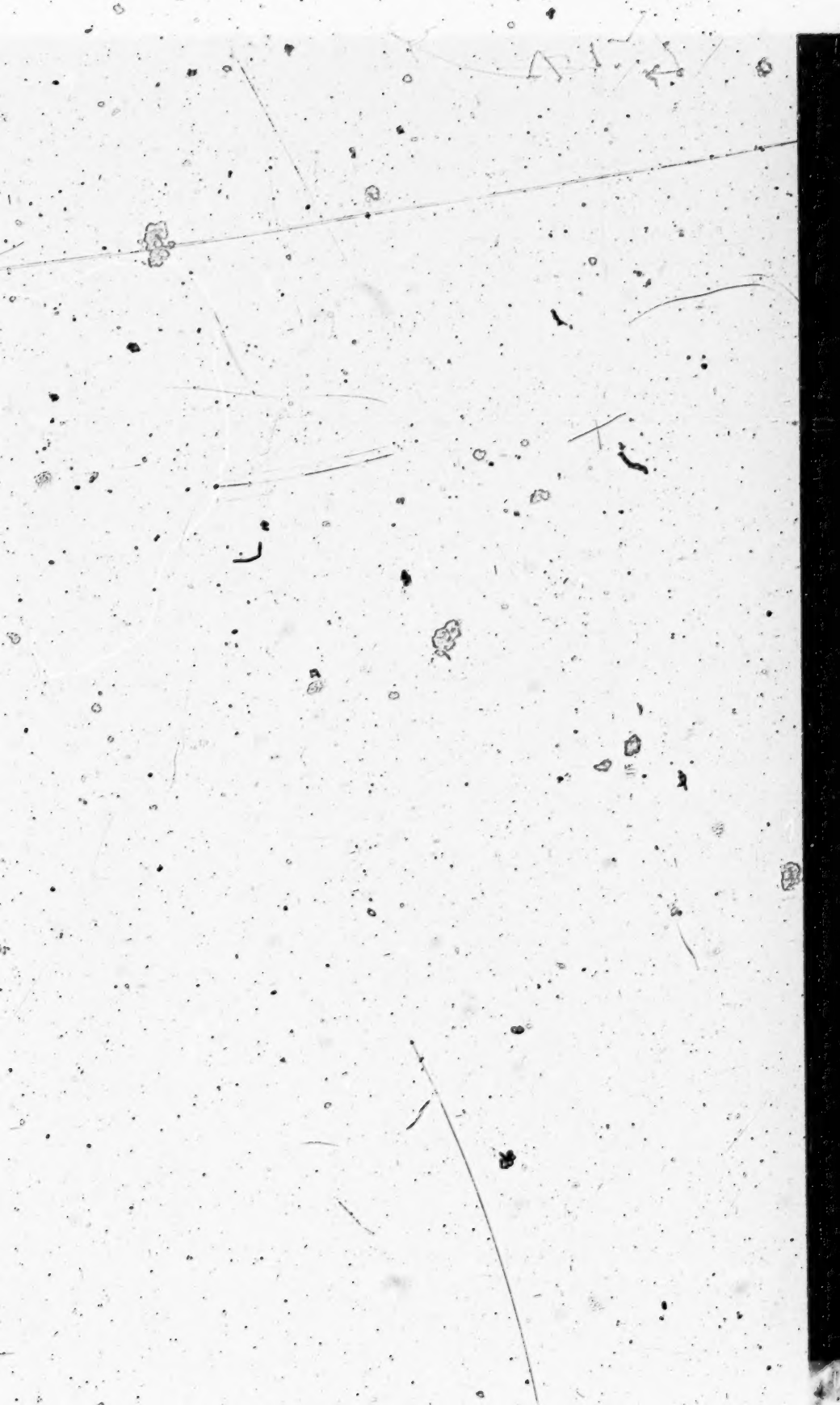
UNITED STATES OF AMERICA, PETITIONER

v.

JOHN C. SHAW, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF SYDNEY C. MCLOUTH, DECEASED

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

REPLY BRIEF FOR THE UNITED STATES



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ARGUMENT

THE UNITED STATES DID NOT WAIVE ITS IMMUNITY FROM AFFIRMATIVE JUDGMENT BY ITS ASSUMPTION OF THE OBLIGATIONS OF THE FLEET CORPORATION OR BY ITS ALLEGED ACQUISITION OF THE CORPORATION ASSETS IN 1923

The respondent contends that by virtue of an "assignment" of all the assets of the Fleet Corporation to the United States in 1923 and by the express provision of the Act of June 29, 1936, the United States has assumed all the contractual obligations of the Corporation, including the commitment on which the counterclaim here involved is

founded, and that the United States is liable to suit on such obligations in the same manner and to the same extent as the Fleet Corporation was (Brief for Respondent, pp. 40–49).

The respondent's position is untenable. The United States' consent to suit against the Fleet Corporation, express or implied, does not include consent to suit against the United States on obligations of the Corporation assumed by the United States. And, subject to exceptions immaterial in this case, the statutes providing for the assumption of the Corporation's contractual obligations by the United States do not confer consent to suit against the United States to any greater extent than provided in the Tucker Act. The assets of the Fleet Corporation were not "assigned" to the United States in 1923, but even if they were the United States did not thereby subject itself to suit save as expressly provided by statute.

1. The cancellation agreement by which the Fleet Corporation assumed McLouth's commitment to the lumber company was executed on May 24, 1920, and included a provision that the materials furnished McLouth for the performance of the orginal construction contract should remain with McLouth as bailee. (See 281 Mich. 191, 194.) The cancellation agreement was assumed by the Shipping Board pursuant to the Act of June 5, 1920 (c. 250, Sec. 2, 41 Stat. 988; 46 U. S. C., Sec. 862 (b) (1)). The Act of June 29, 1936 (c. 858, Title II, Sec. 203, 49 Stat. 1987; 46 U. S. C.

Supp. IV, Sec. 1113 (a)) abolished the Fleet Corporation and provided that "All existing contractual obligations of the dissolved corporation shall be assumed by the United States."

The assumption by the United States under these statutes of the respondent's commitment to the lumber company has no relation to the acquisition by the United States of its claim against McLouth for conversion. The opinion in *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, 3, it is true, recites that the United States acquired all the assets of the Fleet Corporation in 1923 by assignment. The statement in the opinion appears to be based solely on an allegation in the petition for writ of mandamus admitted by demurrer. (Record, *Skinner & Eddy Corp.* v. *McCarl*, No. 30, October Term, 1927, p. 4). So far as the Government has been able to determine, the statement is without any foundation in fact. According to the files of the Department of Justice, the complaint of the United States in its action to recover for conversion of materials by McLouth did not allege any such assignment, and relied only on the theory that the United States was the owner of the property converted, the Fleet Corporation having acted solely as agent of the United States. Cf. *Russell Wheel & Foundry Co.* v. *United States*, 31 F. (2d) 826 (C. C. A. 6th); *King County, Wash.* v. *United States Ship Board E. F. Corp.*, 282 Fed. 950 (C. C. A. 9th).

2. The right to sue the Fleet Corporation on its contracts does not include the right to sue the

United States on its assumption of the Corporation's contracts, unless the United States has so consented by statute. In authorizing the United States Shipping Board to organize a corporation under the laws of the District of Columbia, the Congress contemplated a corporation with capacity to sue and be sued on contracts and torts. *Sloan Shipyards* v. *United States Fleet Corp.*, 258 U. S. 549, 565. The immunity of the United States, this Court held, did not extend to its corporate agent. See *id.* 567, 568. But the United States did not waive its own immunity by authorizing the creation of the Fleet Corporation. The immunity of the United States is not lost by consent to suit against its agents, and extends to all suits on obligations of the agent assumed by the United States. Compare *Turner* v. *United States*, 248 U. S. 354, 359.

In *Federal Housing Administration, Region No. 4* v. *Burr*, No. 354, October Term, 1939, decided Feb. 12, 1940, this Court held that the Administration's power to "sue and be sued" extended to all civil process, including execution on "funds made available" by the National Housing Act. This Court held further, however, that the right to levy execution did not follow the appropriated funds while in the custody of the Treasury. In *Briggs* v. *Light-Boats*, 11 Allen (Mass.) 157, the United States acquired a vessel from a contractor subject to a lien for labor and materials. The court held, in a learned opinion by Justice Gray, that the lien could not be enforced against the vessel while in

the possession of the United States, though it could have been enforced while in the hands of the contractor. It seems equally clear that the remedies available against the Fleet Corporation for the enforcement of its contractual obligations are not available against the United States on the same obligation save to the extent that the United States has expressly consented. The United States has consented to be sued on this contract only in the Court of Claims.

The respondent relies on *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, and *United States* v. *Buford*, 3 Pet. 12, in which it was held that when the United States sues on a claim acquired after the running of the statute of limitations, the statutory bar may be pleaded as a defense. But these cases are not in point. They proceed on the ground that the usual immunity of the United States from such defenses is founded on a policy to protect the Government against the negligence of its agents and has no application, therefore, where the statute has run because of the negligence of others. See *Guaranty Trust Co.* v. *United States, supra*, at 141. They afford no basis for a contention that the right to sue the Government's agent on a contract follows the contract after its assumption by the United States. The Government's immunity from the defense of laches or statutory limitations, it may be observed, extends to actions on claims acquired from private individuals prior to the running of the statutory period. *United States* v. *Nashville, &c., R'y Co.*, 118 U. S. 120, 126.

3. The statutes of 1920 and 1936 do not confer consent to suit against the United States to the same extent that suit could have been maintained against the Fleet Corporation, but on the contrary evidence a purpose to restrict suits against the United States within the limits prescribed by the Tucker Act. Section 2 (b) (2) of the Act of June 5, 1920, saves all rights and remedies against the Fleet Corporation (*Merchant Fleet Corp.* v. *Harwood*, 281 U. S. 519), but consent to suit against the United States is expressly conferred only to the extent allowed by prior statute. The only provision in the statute conferring a right to suit is Section 2 (c), which permits a person dissatisfied with the award of the Board to accept 75% of the award and sue for the remainder claimed in the manner provided by the Tucker Act. *United States* v. *Skinner & Eddy Corp.*, 35 F. (2d) 889, 903 (C. C. A. 9th). The Act of June 29, 1936, directs the Attorney General to defend all "pending" actions against the Corporation and provides that any judgment obtained "in any such pending suit" should be reported to Congress in the manner provided for reporting judgments against the United States.

It will be observed that the Shipping Board assumed only the "contracts or agreements" of the Corporation under the Act of June 5, 1920, and the United States assumed only the "contractual obligations" in 1936. Congress evidently had in view the jurisdictional limitations of the Tucker

Act. Moreover, the Act of June 29, 1936, makes express provision for the defense of "pending" suits by the United States and the payment of any judgments in such "pending" suits, thus evidencing a purpose not to subject the United States to suit in the manner permitted against the Fleet Corporation in any other cases.

4. The respondent asserts that in 1923 the United States acquired all the assets of the Fleet Corporation by assignment, including the claim for conversion on which the Government's judgment was obtained, and thereby assumed all the Corporation's obligations (Brief for Respondent, pp. 42–43). The statement is unfounded in fact, as we have said, but even if the facts asserted were true, the United States' liability to suit by virtue of such an "assignment" would be no greater than that resulting from the operations of the Acts of June 5, 1920, and June 29, 1936. Moreover, adoption of the theory of implied assumption apart from statute would lead to the untenable view that the United States became subject to all the Corporation's obligations, including tort liabilities.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Supreme Court of Michigan should be reversed.

FRANCIS BIDDLE,
Solicitor General.

FEBRUARY 1940.

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